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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1966

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No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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Appellee's motion to affirm asks the Court, without argument, to render out-of-State mail order concerns constitutionally subject to the multiple burdens of collecting and paying use taxes according to the laws of each and every State and unit of local government to which they ship customers' orders, solely by reason of their use of the United States mails to send catalogs into the jurisdic-

tion. No such liability had ever been imposed prior to the decision below.

At the same time appellee apparently admits—for it does not deny—the factual basis for our assertion that the imposition of such a liability would be so onerous as unduly to burden interstate commerce and take appellant's property without a jurisdictional nexus.[1] Nor does appellee deny the importance of the question presented, whether judged by the number of concerns and volume of business affected[2] or the common understanding that this Court has never sustained the collection of a use tax from an exclusively mail order business.[3] The sole ground advanced for the motion to dismiss is that the question has been resolved by prior decisions. Accordingly, we content ourselves here with showing that appellee's view ignores both the facts and the reasoning of the earlier cases.

The nub of appellee's analysis of the precedents is summarized on page 6 of its motion in this inaccurate assertion:

> Thus this Court has clearly, and on at least three different occasions stated that the existence of agents or retail outlets in a State is immaterial with regard to the legislative jurisdiction of a state to require the collection of its use tax . . . .

The Court has never stated that the existence of agents in the taxing State is immaterial, except in the sense that

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[1] Jurisdictional Statement, pp. 9, 14-16. Appellees only response is that its statute "merely treats all retailers who sell to Illinois residents equally." (Motion to Dismiss, p. 7). This is a gross over-simplification. While nominally similar the actual impact of the obligation upon out-of-State mail order firms is entirely different from its impact upon a local merchant for reasons pointed out in the Jurisdictional Statement.

[2] Jurisdictional Statement, p. 17.

[3] *Id.*, at pp. 13-14.

it has held it irrelevant whether the local solicitors are technically "agents" or independent contractors. That technical distinction is no help to appellee's argument because appellant has no representatives of any kind in Illinois and the question is whether the duty to collect the tax may be imposed when there are only mail order sales and no representatives. Plainly the Court has never held or stated that the presence of solicitors or other representatives is immaterial. On each of the three occasions on which the imposition of liability to collect the tax was sustained, the Court stressed the presence of either local outlets or local representatives. In the only case in which there was neither a local outlet nor any other local representatives the Court held that the imposition of the liability would violate the Fourteenth Amendment.

(a) In *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359 and *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, the retailers had local outlets within the jurisdiction. That fact was stressed in both opinions. Appellee asserts (p. 3) that "there was an express holding that . . . solicitation by advertising in the state was the equivalent to solicitation by local agents." Appellant speaks of "advertising" but the Court used the phrase "*local* advertising"[4] to describe the advertising by the local retail outlets. The very passage quoted by appellee from the opinion shows that appellee omits the crux of the decision. The Court said—

> It was stipulated that "advertisments have been caused to be printed *by the retail stores* of petitioner (Montgomery Ward and Co.) in the State of Iowa . . . . [Emphasis supplied.]

[4] Emphasis supplied.

The Court continued—[5]

> The fact that *such solicitation* was done through local advertising rather than directly by local agents as in *Felt and Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, is immaterial. [Emphasis supplied.]

Thus, the holding was only that *local* advertising of the mail order business by the *local* retail stores was not to be distinguished from face to face solicitation by *local* agents. This is a far cry from the claim that mailing catalogs into a State through the United States mail gives it and every other State into which catalogs are mailed jurisdiction to require the out-of-State vendor to collect a local use tax on goods shipped into the jurisdiction.

(b) In *General Trading Co.* v. *Tax Comm'n*, 322 U.S. 335, the retailer sent a sales force into the jurisdiction. The Court held that *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, was dispositive *because the interstate business was solicited by local agents.* This is apparent from the very passage quoted by appellee in its present motion (p. 4):

> The *Gallagher* case is indistinguishable— certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine from without a state as in the *Gallagher* case, compared with the apparently simpler needs for soliciting here.

Manifestly the Court was talking about the local solicitation described in its statement of the facts, not about out-of-State use of the United States mails.

(c) Appellee cites *Scripto, Inc.* v. *Carson*, 362 U.S. 207, as the third occasion on which the Court "stated that the

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[5] One intervening sentence is omitted.

existence of agents or retail outlets in a State is immaterial . . .'' Mr. Justice Clark's opinion makes it perfectly clear that the Court predicated its *Scripto* decision largely upon the proof that ten jobbing firms were acting as Scripto's sales representatives within the State. After saying that there must be ''some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,'' the Court said (p. 211)—

> We believe that such a nexus is present here. First, the tax is a nondiscriminatory exaction . . . . Next, as Florida points out, appellant has 10 wholesalers, jobbers, or ''salesmen'' conducting continuous local solicitation in Florida and forwarding the resulting order from that State to Atlanta for shipment of the ordered goods.

And the very first point made by Justice Clark in distinguishing *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, from *Scripto* was that, ''Miller had no solicitors in Maryland.''

The short of the matter is that there is nothing in this Court's prior decisions holding that sending catalogs into a State through the United States mails is an adequate basis for requiring an out-of-State vendor to collect and pay over a local tax upon any purchaser's local use of the advertised goods. In all the cases to date the Court has rested decisions sustaining the liability upon some local activity by local representatives. It was their presence alone which gave jurisdiction to tax and justified the burden upon interstate commerce. The highest court of Alabama, the special subcommittee of the Judiciary Committee of the House of Representatives and the commentators all recognize this essential point.[6] Appellee not only fails to

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[6] Jurisdictional Statement, pp. 12-14.

mention them but cites no contrary authority, except the decision below.

Conclusion

The motion to affirm should be denied. Probable jurisdiction should be noted.

Respectfully submitted,

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